IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-39

Supreme Court, U. S.
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MEMPHIS LIGHT, GAS AND WATER DIVISION, *et. al.*,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

THOMAS M. DANIEL
MEMPHIS & SHELBY COUNTY
LEGAL SERVICES
ASSOCIATION
325 Dermon Building
46 North Third Street
Memphis, Tennessee 38103
(901) 526-8210

Counsel for Respondents

RICHARD ALPERT
ALAN DAVIS
ELLIOT TAUBMAN
NATIONAL CONSUMER
LAW CENTER, INC.
Eleven Beacon Street
Boston, Massachusetts 02108

BRUCE MAYOR
NEIGHBORHOOD LEGAL
SERVICES
524 Albany Avenue
Hartford, Connecticut 06112

On the brief

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF FOR RESPONDENTS

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Tennessee Code Annotated and the Memphis Code of Ordinances, which were not included in Petitioners' Brief are set forth in Appendix B, attached hereto.

QUESTIONS PRESENTED

1. Whether water, gas and electricity service which a municipally owned utility company has a legal duty under state law to provide is a property interest protected by the Due Process Clause of the Fourteenth Amendment?

2. Whether a procedure for termination of water, gas and electricity service which provides neither notice of the opportunity to be heard nor any opportunity to be heard is consistent with the Due Process Clause of the Fourteenth Amendment?

SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

This action was brought by five plaintiffs [1] under the Civil Rights Act, 42 U.S.C. Section 1983, seeking damages, declaratory and injunctive relief against a municipal utility, alleging that their water, gas and electricity service had been terminated without due process of law as required by the Fourteenth Amendment to the United States Constitution. [2] (A.3-18).

The District Court found that the Memphis Light, Gas and Water Division and the other defendants [3] (hereinafter referred to collectively as MLG&W) had not violated the plaintiffs' due process rights and dismissed the action. (Opinion and Order

[1] The suit was filed as a class action pursuant to Fed. R. Civ. P. 23(b)(2). The District Court refused to certify the cause as a class action (App. B to Petition for Certiorari, 42), and this holding was affirmed by the Court of Appeals. *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684, 686 (6th Cir. 1976).

[2] Plaintiffs also challenged the right of Memphis Light, Gas and Water Division to refuse to initiate service to a person because of an outstanding bill owed by another person at the address where service is sought. Plaintiffs were ultimately successful in this claim, *Craft v. Memphis Light, Gas and Water Division, supra*, 534 F.2d at 689-90, and no review of this part of the Court of Appeals decision was sought.

[3] The individual defendants are Calvin Henze, President of Memphis Light, Gas and Water Division; Henry J. Winkelman, Vice-President; Eliot Whittington, Commissioner; Robert S. Bowers, Commissioner; Patricia Shaw, Commissioner. Clyde Brown and C.R. Tennen, employees of M.L.G.&W. who effected the termination of utility service to the plaintiffs on one or more occasions, were made defendants in the Amended Complaint filed August 29, 1974.

attached to Petition for Certiorari as App. B, 33-49.) However, the District Court did suggest certain changes in the termination procedure of MLG&W "to improve the procedure used in terminating utility services for non-payment and with respect to negotiating disputes and difficulties about the outstanding amount of bills." (App. B to Petition for Certiorari, 48).

The Court of Appeals reversed the decision of the District Court in so far as it held that the Crafts had been afforded due process and remanded the case to determine the specific process due. *Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684 (6th Cir. 1974). The Court of Appeals affirmed that portion of the District Court decision which held no due process violation as to Sarah Parks but reversed the lower court finding of no equal protection violation as to Ida Bell Holmes. Since no review was sought in this Court concerning that portion of the decision concerning Holmes and Parks, only the holding of the Court of Appeals concerning Mr. and Mrs. Willie S. Craft is presently before the Court. [4]

Mr. and Mrs. Willie S. Craft, homeowners in Memphis, had their water and other utility services cut off five times by MLG&W between June, 1973 and the filing of this suit in February 1974. (App. B to Petition for Certiorari, 38). The first time, when only their water service was terminated, Mrs. Craft took a day off work and went to the main office of MLG&W, where she stayed the entire day attempting to ascertain the reason for the termination. Because the matter was not resolved the first day, Mrs. Craft returned the following morning in a further attempt to have her water service restored. The matter again was not resolved, and the Craft family was without water service for a week before service was restored. (A.86-87).

Shortly after the water problem was resolved, the Crafts began to receive two computer billings each month from MLG&W,

[4] One of the original plaintiffs, Annie Sue Funzie, did not participate in the trial or the appeal below because, by stipulation of counsel for both parties, her utilities had been terminated for failure to pay a correct and undisputed utility bill.

each containing charges for gas and electricity service. (A.89, 33-35). One computer bill was in the name of Willie *S.* Craft and the other in the name of Willie *C.* Craft. Over a period of several months, all the Crafts' utility services were terminated at least four times. The employee of MLG&W effecting the terminations did not personally contact the Crafts or any other person in the home prior to making the terminations. (App. B to Petition for Certiorari, 38). When service was terminated, Mrs. Craft visited the office of MLG&W to learn the reason for the double computer billings and the terminations of service. Each time she was unsuccessful. On at least three of these visits, Mrs. Craft took off time from work and spent the entire day in MLG&W's offices. (App. B to Petition for Certiorari, 38; A.93).

The District Court specifically found that "all during the time of these disputes, Mr. and Mrs. Craft made good faith efforts to pay for their utilities as well as to straighten out their problems." (App. B to Petition for Certiorari, 39). Despite this, the Crafts were met with hostility from MLG&W employees. For example, on one occasion Mrs. Craft called MLG&W's offices to explain that she had paid the bill that MLG&W claimed was still outstanding, but an MLG&W employee told her she must "pay it again" to avert the threatened termination. (A.103-4). On another occasion, Mrs. Craft was cursed by an MLG&W employee. *Id.* MLG&W's employees also refused to identify themselves or disclose to Mrs. Craft the names of any supervisors to contact. (A.97).

The Crafts finally were told by MLG&W that the reason for the double computer billing each month was that they had two gas meters and two electric meters at their house. Although the Crafts were aware of the two meters, they thought one set was closed off. At the suggestion of MLG&W, the Crafts then paid $152.20 to have one set of meters removed. Nevertheless, the Crafts continued to receive double computer billings for two months after the extra meters were removed. (A.94; App. B to Petition for Certiorari, 38).

Not until after this action was filed were the Crafts able to discover that they continued to receive double computer billings because MLG&W failed to combine the two accounts properly, (A.146-150), or that, as a result of the double computer billings, MLG&W had overcharged them for gas service and city service fees.[5] (A.171).

When MLG&W's computer determines that payment is not received for utility service, the computer sends a form notice to the customer, stating that service will be disconnected if the amount listed as due is not paid by 5:00 P.M. on the date listed. (Def. Ex. 7; A.42, 136). With the notice is one of two "flyers".[6] The first, sent to 40% of MLG&W's customers given final notice, informs customers solely of the availability of community credit counseling procedures to help a customer "having difficulty paying" the bill. It does not inform the customer of any steps to take to resolve a disputed bill. The second flyer, sent only to areas not accommodated by community credit counseling stations, possibly mentions that the customer may bring the bill to an MLG&W office if there is a dispute. *Craft v. MLG&W, supra*, 534 F.2d at 688 n.4.[7] The Court of Appeals refused to find that the Crafts were sent this second flyer.[8] *Id.*

Memphis Light, Gas & Water Division, a municipal utility, has "no established procedure for resolution of disputes" with its customers, *Id.* at 689, either before or after the termination of service. Nor has MLG&W any written policies concerning resolution of disputes. Furthermore, no agency provides any

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[5] The city service fee is a separate item on the regular utility bill as specified by the City of Memphis Code, Section 19-14.

[6] *See Craft v. MLG&W, supra*, 534 F.2d at 688 n.4.

[7] Although MLG&W's witness quoted one of their "flyers" as giving information concerning resolution of disputes (A.137), the flyers that he introduced into evidence contained no language about dispute resolution. (Def. Ex. 9(a) and 9(b); A.45, 137).

[8] MLG&W failed to introduce evidence at trial to show whether the Craft's resided in a geographic area not served by community credit counseling stations. Mrs. Craft testified at trial that she did not receive the second flyer, or any other notice of termination. (A.102-3).

complaint resolution procedures for disputes with MLG&W. The Tennessee Public Service Commission has no jurisdiction over municipal utilities. Tenn. Code Ann. §6-1306, 1317.

A customer who has a dispute with MLG&W may seek to resolve the matter by complaining to MLG&W's employees, as did Mrs. Craft. But this is left entirely to the initiative of the customer, and there is no established procedure to be followed. (A.162-3). The only way a customer even would know with whom to talk is by word of mouth referral. (A.163). As the Court of Appeals noted, the Secretary-Treasurer of MLG&W at first refused to acknowledge at the trial that any customer could have a bona fide dispute, although later in the trial he acknowledged there could be customer disputes in extremely limited circumstances. *Craft v. MLG&W, supra*, 534 F.2d at 689 & n.7; (Tr.226-9) (A.164).

Although MLG&W does have a well defined extended payment plan for those having difficulty paying an admitted liability, this "provides no avenue for customers who . . . dispute the existence of the liability." *Craft v. MLG&W, supra*, 534 F.2d at 689.

SUMMARY OF ARGUMENT

Water, gas and electricity service from a municipally owned utility is a property interest protected by the Due Process Clause of the Fourteenth Amendment. Protected property interests include a "variety of interests which are difficult of definition", *Paul v. Davis*, 424 U.S. 693, 710 (1976), and they are defined and determined by any of several sources, including state law. *Goss v. Lopez*, 419 U.S. 565 (1975).

Tennessee common law establishes that the Crafts have a property interest in the continued receipt of water and other vital utility services. Customers of a utility have a "legal right" under Tennessee law to continued service and the utility has a "legal duty" to supply it. *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S.W. 1058 (1897); *Farmer v. Nashville*, 127 Tenn.

509, 156 S.W. 189 (1912). Although a recipient of utility service may be required to comply with reasonable regulations of a public utility, including payment of a justly imposed bill, a customer's service cannot be terminated lawfully where a bona fide dispute exists. *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975), *cert. den.*, March 15, 1976.

Since the Crafts have a property interest in the continued receipt of water, gas and electricity, "the question remains, what process is due". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). MLG&W's termination procedures lack even the minimum due process requirements of notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Wolff v. McDonnell*, 418 U.S. 539, 557-8 (1974). The notice form used by MLG&W is not reasonably calculated to inform the consumer of any method for disputing a contested bill, nor does MLG&W or any agency provide any hearing procedure for the resolution of disputes either before or after termination of service.

Determination of the specific requirements of due process requires analysis of the various interests at stake. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The severity of deprivation of water and other services, the great risk of erroneous deprivation, and MLG&W's minimal interest in prompt payment and minimal administrative burden require MLG&W to provide timely notice adequately informing the customer of the reasons for the termination and the steps to take to resolve a dispute concerning the bill and to provide a hearing prior to termination. *Palmer v. Columbia Gas Co.*, 479 F.2d 153 (6th Cir. 1973). The hearing should include the right to present information and rebut the records presented to support the proposed termination, the right to an impartial decision maker and a written decision. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

ARGUMENT

I.

RESPONDENTS HAVE A PROTECTED PROPERTY INTEREST IN THE RECEIPT OF WATER, GAS AND ELECTRICITY SERVICE FROM PETITIONERS.

This Court consistently has held that property interests protected by the Due Process Clause of the Fourteenth Amendment from arbitrary governmental deprivation [9] consist of more than the "actual ownership of real estate, chattels or money", *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), and include a "variety of interests which are difficult of definition." *Paul v. Davis*, 424 U.S. 693, 710 (1976). *See Dixon v. Love*, ___ U.S. ___ , 45 U.S.L.W. 4447 (1977) and *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Goss v. Lopez*, 419 U.S. 566 (1975) (public school education); *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (possessory interest in chattel goods); *Perry v. Sindermann*, 408 U.S. 593 (1972) (contract of employment at state university); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (right to purchase liquor).

To determine whether an interest is protected by the Due Process Clause, the Court has directed the inquiry to various possible sources of protection, such as specific guarantees of the Bill of Rights incorporated into the Fourteenth Amendment, *see Monroe v. Pape*, 365 U.S. 167 (1961) (unreasonable search and seizure violative of the Fourteenth Amendment); *Paul v. Davis*,

[9] Since MLG&W is municipally owned and operated (App. B to Petition for Certiorari, 38), its conduct of terminating the Crafts' utilities constitutes state action or action under color of state law. *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968). Thus, this case raises the issues specifically reserved by the Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974).

424 U.S. 693, 710 n.5 (1976); or the "core values" of liberty, *see Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (interest in continued parole); or those rights " 'fundamental' or 'implicit in the concept of ordered liberty.' " *Roe v. Wade*, 410 U.S. 113, 152 (1973) (woman's decision to terminate pregnancy); *see Boddie v. Connecticut*, 401 U.S. 371, 374-7 (1971) (indigent's right of access to courts to dissolve marriage).

This Court also has held that state law can be a source of protected interests. For example, in *Goss v. Lopez, supra*, 419 U.S. at 572-3, the Court, finding a protected property interest in public school attendance, stated, "Protected interests in property are normally 'not created by the Constitution. Rather they are created and their dimensions defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." The specific aspect of state law creating the protected interest may be a statute or regulation, *see Goss v. Lopez, supra* (right to attend public school); an ordinance, *cf. Bishop v. Wood*, 426 U.S. 341 (1976) (public employment); a contract, express or implied, *see Perry v. Sindermann, supra* (employment at state university); a policy or practice, *see Perry v. Sindermann, supra*, 408 U.S. at 603; or the state common law, *see North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Boddie v. Connecticut, supra*, 401 U.S. at 375. Thus, a right or status recognized by state law is subject to the protection of the Due Process Clause. *Paul v. Davis, supra*, 424 U.S. at 711.

The state law need not explicitly grant the specific protected interest as long as it creates a reasonable expectation, or "legitimate claim of entitlement", to the property or liberty. *See Perry v. Sindermann, supra* (implied contract); *Morrissey v. Brewer, supra*, 408 U.S. at 479 (parolee's continued entitlement to liberty "implicit" in parole system); *see also Bell v. Burson, supra* (no express right to continued enjoyment of a driver's license); *Wisconsin v. Constantineau, supra* (property interest exists in purchasing liquor absent express authority); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (no express right to practice law); *Dent v. West Virginia*, 129 U.S.

114 (1889) (no express right to practice medicine). That the expectation or entitlement is a "privilege" rather than a "right" is not relevant. *E.g., Elrod v. Burns*, 427 U.S. 347, 361 (1976); *see generally* Van Alstyne, *Cracks in "The New Property"*, 62 Cornell Law Rev. 445, 445-8 (1977).

Similarly, that the entitlement is not unconditional has uniformly been assumed to be no bar to protected status where the person's interest is more than a unilateral expectation or abstract need or desire. *See, e.g., Mathews v. Eldridge, supra* and *Goldberg v. Kelly, supra* (no right to welfare benefits absent eligibility); *Goss v. Lopez, supra* (no right to continuous free public education if less than 6 years old, more than 21 years old, or where misconduct exists); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (no right to good time credits where there is flagrant or serious misconduct); *Bell v. Burson, supra* (no right to driver's license if under age, if unable to pass driver's test, or if uninsured and unable to post security after involvement in accident); *Connell v. Higgenbotham*, 403 U.S. 207 (1971) (no right to continued public employment where misconduct exists); *Wisconsin v. Constantineau, supra* (no right to purchase liquor if under age or if dangerous to peace of community); *Schware v. Board of Bar Examiners, supra* (no right to practice law if bad moral character or lacking in proficiency in the law). *See also* Monagham, *Of Liberty and Property*, 62 Cornell L. Rev. 405, 440-41 (1977).

Tennessee common law creates in the Crafts "a legitimate claim of entitlement" to continued receipt of water, gas and electricity service from MLG&W. *See Farmer v. Nashville*, 127 Tenn. 509, 156 S.W. 189 (1912); *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S.W. 1058 (1897); *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730, 733 (Tenn. App. 1975), *cert. den.*, March 15, 1976.

The Tennessee Supreme Court held in *Crumley* that customers of the water company had a "present legal right" to water service. 99 Tenn. at 427. The water company had accepted Crumley's note for his past due obligation for water previously furnished. After a short period of not taking the

company's water, Crumley requested resumption of water service and tendered the regular rates. The water company refused to provide service until Crumley actually paid in full his past due bill. The Tennessee Supreme Court held that the company had breached its legal duty toward Crumley by refusing to provide water since it already had accepted his credit for past indebtedness. *Id.* at 423. As the Court reasoned:

> There are exceptions to the general rule that a person engaged in business may, at his election, and without good reason, refuse to deal with some other person. These exceptions embrace . . . gas companies, electric light companies, and water companies, and are based upon the public nature of the business done by such persons. Being engaged in public business under public grants, they are charged with public duties.

Id. at 422-3.

Similarly, in *Farmer v. Nashville, supra*, a tenant brought suit against the City of Nashville because of the latter's refusal to provide water service to his home. The city had terminated service based on a previous tenant's unpaid bill charged to the owner. The city maintained that its by-law permitted termination for non-payment of the water bill by the property owner to whom the service was provided. The Tennessee Supreme Court, however, finding for the tenant, held that the city utility was "charged with the public duty of furnishing water to all the inhabitants of the city," 127 Tenn. at 515, and that its by-law was "unjust, unreasonable, and unauthorized by...[its] charter, and is therefore void." *Id.* at 518. *Accord, Watauga Water Co. v. Wolfe*, 99 Tenn. 428, 430-31, 41 S.W. 1060, 1061 (1897); *Trigg v. Middle Tennessee Electric Membership Corp., supra*, 533 S.W.2d at 733.

Furthermore, Tennessee law provides that a utility, having extended service to an area, has no right to withdraw service from customers in that area on the ground that it had no obligation to provide service in the first instance. *Chandler Inv. Co. v. Whitehaven Utility Dist. of Shelby County*, 44 Tenn. App. 1, 21, 311 S.W.2d 603, 612 (1957), *cert. den.*, March 4,

1958. Thus, since utility service has been extended by MLG&W, the Crafts have a legitimate claim of entitlement to the service and it cannot be revoked arbitrarily.

MLG&W relies on *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W.2d 291 (1951) to contend that it has no legal duty to continue service to customers who do not pay the full charges MLG&W claims is due. Petitioners' Brief at 25. They thus assert an unrestricted right to terminate service during a dispute over a bill even where the customer makes good faith efforts to both resolve the dispute and pay the undisputed portion of the bill. *Id.* at 29-31.

But *Patterson* does not support this contention. It held only, and quite properly, that utility customers have no property right in continued utility service where there is an undisputed non-payment of a proper bill and the utility has adopted reasonable regulations permitting termination in such circumstances. *Patterson v. City of Chattanooga, supra*, 192 Tenn. at 276, 241 S.W.2d at 296. This holding is entirely consistent with *Farmer, Crumley* and *Trigg*. Indeed, the Court in *Patterson* cites *Farmer* with approval, *Id.*, and does not purport in any way to overrule its seminal decision in *Crumley*.

As in *Farmer, Crumley* and unlike *Patterson*, this case does not involve non-payment of an undisputed proper bill. The Crafts' water and other services were terminated because of a bona fide, indeed valid, dispute and despite the Crafts' good faith efforts to resolve the dispute promptly. It is the common law of Tennessee, as in other jurisdictions without exception, [10] that it is unreasonable and unlawful for a utility to terminate service where a bona fide dispute exists.

[10] *See, e.g., Mobile Electric Co. v. Nelson*, 209 Ala. 554, 96 So. 713 (1923); *Steele v. Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613 (1937); *Winchester v. Kentucky Utilities Co.*, 182 Ky. 144, 206 S.W. 296 (1929); *Mississippi Power Co. v. Cochran*, 167 Miss. 705, 147 So. 473 (1933); *Randolph v. St. Joseph Gas Co.*, 250 S.W. 642 (Mo. App. 1923); *Miller v. Roswell Gas & Electric Co.*, 22 N.M. 594, 166 P. 1177 (1917); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933); *Southwestern Gas & Electric Co. v. Stanley*, 123 Tex. 157, 70 S.W.2d 413 (1934); Annot., 112 A.L.R. 237 (1938).

> A company supplying electricity to the public has the right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot. 112 A.L.R. 237 (1938). An exception to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele v. Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A.L.R. 237, 241 (1938); *see* also 43 Am.Jur., Public Utilities and Services, Sec. 65; Annot., 28 A.L.R. 475 (1924).

Trigg v. Middle Tenn. Electric Membership Corp., supra, 533 S.W.2d at 733.

Because of the utility's natural monopoly and public duty, the utility is so constrained even if it adopts a rule or regulation permitting termination despite the dispute:

> We are aware that defendant's rules and regulations, which plaintiffs agreed to obey, require payment whether or not a bill is received by a customer. In our view however, this rule does not resolve the conflict that arises when a customer, who is willing to and does pay a certain portion of the bill, disputes the amount due. ***A public utility should not be able to coerce a customer to pay a disputed bill.*** (emphasis added)

Id. See also Crumley v. Watauga Water Co., supra, 99 Tenn. at 427. Like the utility in *Trigg*, MLG&W's regulation permitting termination of service for non-payment does not "resolve the conflict" in favor of MLG&W where there is a bona fide dispute. Thus, under Tennessee law MLG&W is under a "legal duty" to provide, and the Crafts have a "legal right" to receive, water and other services. *Farmer v. Nashville, supra*; *Crumley v. Watauga Water Co.*, supra.

The common law right to utility service particularly requires due process protection because of the extent of the deprivation involved. Whether the interest is protected from arbitrary deprivation by the Due Process Clause depends generally on its "nature" rather than "weight", *Board of Regents v. Roth, supra*, 408 U.S. at 571, but the extent of deprivation also may be relevant. *See Morrissey v. Brewer, supra*, 408 U.S. at 481

("grievous loss" of parole revocation); *cf. Meachum v. Fano*, 427 U.S. 215, 235 (1976) (Stevens, J., dissenting) ("grievous loss"); *Goss v. Lopez, supra*, 419 U.S. at 742-3 (Powell, J., dissenting) ("serious or significant infringement").

Deprivation of water is deprivation of "an absolute necessity of life". *Davis v. Weir*, 328 F. Supp. 317, 321 (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974). Particularly in urban areas, such as where the Crafts reside in Memphis, water from the utility is "indispensible to life and health". *Koger v. Guarino*, 412 F. Supp. 1375, 1388 (E.D. Pa. 1976), *aff'd on opinion below*, ____ F.2d ____ (3rd Cir. 1977); *see also Lamb v. Hamblin*, 57 F.R.D. 58, 60 (D. Minn. 1972) and discussion at 18, *infra*. There are no alternatives in urban areas, as in rural regions, of streams or lakes. [11] Thus customers of MLG&W, like the Crafts, are entirely dependent on the utility for life-sustaining water. Termination of gas and electricity service in conjunction with water termination may be even more grievous, particularly in winter, when death by freezing can occur quickly. *See Stanford v. Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972), and discussion at p. 19, *infra*.

In sum, the Crafts' legal right under Tennessee law to receive water, gas and electricity from MLG&W is a property interest protected by the Due Process Clause of the Fourteenth Amendment. *Wolff v. McDonnell, supra*; *Morrissey v. Brewer, supra*; *Perry v. Sindermann, supra*; *Bell v. Burson, supra*.

[11] While the digging of a well is not prohibited outright in Memphis, it is subject to extensive regulations and procedures making it entirely infeasible for an individual urban homeowner. *See* City of Memphis *Code* §32-102 et. seq.

II.

RESPONDENTS ARE ENTITLED TO ADEQUATE NOTICE AND HEARING PRIOR TO BEING DEPRIVED OF THEIR PROTECTED INTEREST IN WATER, GAS AND ELECTRICITY SERVICE.

Since the Crafts possess a protected property interest in continued water, gas and electricity service, their utility service cannot be terminated by MLG&W without due process of law. *See, Mathews v. Eldridge, supra*; *Wolff v. McDonnell, supra*; *North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Perry v. Sindermann, supra*. However, "the question remains what process is due". *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Although "[d]ue process is perhaps the least frozen concept in our law," *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1955) (Frankfurter, J., concurring), this Court consistently has held that adequate process encompasses at a minimum the right to notice and an opportunity to be heard, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1960), and that these rights "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

A. MLG&W's Notice Is Not Reasonably Calculated To Inform A Customer Of The Method For Disputing A Bill.

The notice used by MLG&W is constitutionally defective because it fails to adequately inform customers how they can dispute a bill. This Court has said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 314.

The computer notice sent to the Crafts was not reasonably calculated to inform them of how to present their objection. Designed solely to aid those unable to pay their bill, the notice fails to mention any possible procedures for dispute resolution. [12] Accompanying the notice is one of two flyers. The first flyer, sent to 40% of all customers sent final notice, also fails to mention any procedures for dispute resolution. The second flyer, sent to customers in only some areas, may refer to a procedure for resolving a dispute, [13] but the Court of Appeals refused to find that the Crafts were sent this flyer. *Craft v. Memphis Light, Gas & Water Division, supra,* 534 F.2d at 688 n.4. As the Court of Appeals found in summing up the inadequacies of MLG&W's notice procedure:

> Constitutionally sufficient 'shut-off notice . . . [must] provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service.' [*Palmer v. Columbia Gas,* 479 F.2d 153, 166 (6th Cir. 1973)]. Yet the MLG&W "final notice" no better informs customers, like the Crafts, who dispute the underlying liability than the constitutionally deficient notice in *Palmer.* Like the Columbia Gas notice therein, the MLG&W notice fails to mention "that a dispute concerning the amount due might be resolved through discussion with representatives of the company." Nor did the notice, at least prior to the opinion of the district court, inform the customer that "[c]redit [c]ounselors are available to clear up any questions, [to] discuss disputed bills or to make any needed adjustments." [Citation and footnote omitted.] Like the Columbia Gas notice, the MLG&W notice only warns the customer to pay or face termination. *See Davis v. Weir,* 359 F. Supp. 1023, 1026 (N.D.Ga. 1973); *Bronson, supra,* 350 F. Supp. at 450.

Id., at 687-89.

[12]MLG&W changed its notice in response to a suggestion by the District Court. However, the amended notice fails to make any reference to procedures for resolving a dispute. *See Craft v. MLG&W, supra,* 534 F.2d at 688 n.5.

[13]See footnote 7, *supra.*

The procedures followed by MLG&W's service personnel actually effecting the termination are also completely inadequate for customers with disputed bills. MLG&W's witness testified that service personnel are instructed to "attempt" a personal contact prior to termination by knocking on the customer's door. (A. 112). But as the District Court found, the Crafts never received such personal notice, (App. B. to Petition for Certiorari, 38), and in fact such attempts are unsuccessful nearly one half the time. (A. 191). Even if personal contact were made, service personnel are authorized to postpone the termination only if there is an illness in the family or if the customer states that full payment is in the mail. (A. 112). They have no authority to postpone where a customer, like the Crafts, contests a bill. *Craft v. MLG&W, supra,* 534 F.2d at 689.

In sum, MLG&W relies on three inadequate procedures to satisfy the notice requirement of due process: (1) a final notice that contains no indication of how a miscalculated bill might be questioned, challenged and corrected; (2) a reference to a procedure for dispute resolution contained in a "flyer" sent to customers in only some geographic areas but not sent to the Crafts; and (3) the possibility of personal contact by service personnel who cannot postpone termination for persons, like the Crafts, disputing a bill.

While these procedures may be adequate constitutionally for those unable to pay their bill, that issue is not before this Court. The issue here is whether the notice was reasonably calculated to inform the Crafts of the procedures for disputing a bill. The procedures are wholly inadequate for this purpose.

B. The Complete Lack of Hearing Procedures For The Resolution of Disputes Violates Due Process

The procedural due process decisions of this Court have "consistently held that some kind of hearing is required at some time *before* a person is finally deprived of his property interests." *Wolff v. McDonnell, supra,* 418 U.S. at 557-558 (emphasis

added). *E.g., Smith v. Organization of Foster Families,* —— U.S.——, 45 U.S.L.W. 4638, 4646 (June 13, 1977); *Mathews v. Eldridge, supra,* 424 U.S. at 333; *North Georgia Finishing Co. v. Di-Chem, Inc., supra,* 419 U.S. at 606; *Goss v. Lopez, supra,* 419 U.S. at 578; *Board of Regents v. Roth, supra,* 408 U.S. at 568-70; *Bell v. Burson, supra,* 402 U.S. at 542; *Wisconsin v. Constantineau, supra,* 400 U.S. at 437.

Neither MLG&W nor any administrative agency has any hearing procedures for the resolution of customer disputes, either before or after termination. In fact, MLG&W's Secretary-Treasurer was reluctant to admit that a customer could ever have a bona fide dispute. *Craft v. MLG&W, supra,* 534 F.2d at 689 & n.7. The Crafts were terminated on a least five separate occasions. Yet, they were forced to bring this action to ascertain the reasons for termination. Mary Craft lost at least five full days from work to go to MLG&W's office in a vain effort to learn why her family was left without water and other services. (A. 93).

This is not a case where extensive procedures are provided but the time or sufficiency of the hearing procedures is in issue. *Compare with Smith v. Organization of Foster Families, supra,* 45 U.S.L.W. at 4639-42 (extensive statutory procedures); *Dixon v. Love, supra,* 45 U.S.L.W. at 4448-49 (full post-deprivation hearing on license suspension plus full judicial hearing on each conviction); *Mathews v. Eldridge, supra,* 424 U.S. at 335-40 ("elaborate" post-termination proceedings).

Rather this case involves a complete lack of hearing procedures for resolving disputes. This case, therefore, is similar to other decisions of this Court where the absence of any hearing procedure was found to be violative of procedural due process. *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring) and cases cited therein; *Perry v. Sindermann, supra*; *Morrissey v. Brewer, supra.*

MLG&W cites its procedure for arranging extended payment as proof of adequate hearing procedures. The extended payment plan, however, is not meaningful to customers, like the Crafts, who are ready and willing to pay what they actually owe, but dispute the amount of the bills. As the Court of Appeals found, the

extended payment plan "provides no avenue for customers who . . . dispute the existence of the liability." *Craft v. MLG&W, supra,* 534 F.2d at 689.

C. Analysis of the Competing Interests Requires a Meaningful Hearing Prior to Termination of Service.

Recently, this Court has articulated a standard for considering the pertinent interests to determine the type and nature of a hearing required by due process. In *Mathews v. Eldridge,* the Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-5; *see Smith v. Organization of Foster Families for Equality and Reform, supra,* 45 U.S.L.W. at 4646; *Dixon v. Love, supra,* 45 U.S.L.W. at 4449; *Ingraham v. Wright,* —— U.S. ——, 97 S. Ct. 1401, 1414-15 (1977); *see also Goss v. Lopez, supra,* 419 U.S. at 579.

Analysis of these three factors shows that the Crafts have suffered a grievous deprivation; the risk of erroneous deprivation is substantial; and MLG&W and the City of Memphis will suffer little harm and actually may benefit from imposition of hearing requirements.

1. Deprivation of Water, Gas and Electricity Service is Severe.

Water is an absolute necessity of life. *Koger v. Guarino, supra*; *Davis v. Weir, supra*. It is necessary for nourishment, personal hygiene and sewage disposal. A home without access to water is unfit for human habitation. *See* City of Memphis Code §51-111 et. seq. The absence of water can cause disease and death and is a clear public safety hazard. As one district court observed: "Termination of water service inflicts hardships on the consumer that transcend the deprivation of other protected interests". *Lamb v. Hamblin, supra,* 57 F.R.D. at 61.

While water is unique for human life, the loss of electricity and gas also can threaten life, health and safety. Early found to be a "indispensible necessity of life," *Jones v. Portland,* 245 U.S. 217, 223 (1917), electricity runs oil and coal burners, refrigerates food, and lights homes. Termination of electricity can shut off home life support systems. [14] Elderly people have died when their furnaces could not function for lack of electricity. *See, e.g., Grand Jury Report Pursuant to Section 190.85 of the Criminal Procedure Law of the State of New York* (Schenectedy Cty., N.Y. June 21, 1974).

Gas similarly is used for heat in many homes, and its absence can be threatening to life. As one court noted in comparing loss of gas with loss of welfare benefits: "A person can freeze to death or die of pneumonia much more quickly than he can starve to death." *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241, 244 (N.D.Ohio 1972), *aff'd,* 479 F.2d 153 (6th Cir. 1973). *See also Stanford v. Gas Service Co., supra,* 346 F. Supp. at 719-20 (gas for heating is "necessary to sustain life"); *Re Transcontinental Gas Pipeline,* 16 P.U.R.4th 423, 451 (F.P.C. 1976) (mandatory cessation of

[14] A case documented in the Massachusetts Department of Public Utilities involves a child whose life depended on an electric breathing system. Her mother allegedly owed an electric bill. With knowledge of the situation, the company attempted termination. Fortunately for the child, termination mistakenly was effected of her aunt's electric service. *Re Mary Silva* (Mass. D.P.U. Oct. 1976).

gas service held unacceptable because of "potential dangers . . . of human suffering").

Thus, the cumulative consequences of water, gas and electricity termination are potentially catastrophic, depriving the customer of "the very means by which to live." *Goldberg v. Kelly, supra,* 397 U.S. at 264. It constitutes a deprivation far more serious and immediate than the loss of welfare benefits, *Id.*; wages, *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); driver's license, *Bell v. Burson, supra*; possession of personal property, *North Georgia Finishing Co. v. Di-Chem, Inc., supra*; and the monetary loss resulting from paying higher wages, *Opp Cotton Mills v. Administrator,* 312 U.S. 126 (1940), all of which require substantial procedural protections.

The power to terminate water and other vital services is the power to coerce. *See Crumley v. Watauga Water Co., supra,* 99 Tenn. at 427, 41 S.W. at 1060; *Trigg v. Middle Tenn. Electric Membership Corp., supra,* 533 S.W.2d at 733. Procedural protections for Memphis residents, like the Crafts, are essential to shield them from the severe consequences of arbitrary government termination of vital services.

2. The Risk Of Erroneous Deprivation Is Substantial And Procedural Safeguards Will Avoid Unwarranted Injury.

In large governmental entities like MLG&W, the problem of computer and human error is significant. MLG&W, involved in multitudinous transactions with the public, bills hundreds of thousands of customers monthly by computer. (A. 73). Computer transactions now affect the individual in most aspects of daily life. *See, e.g.,* Senate Committee on Government Operations, *Staff Study on Computer Security in Federal Programs,* 95th Cong., 1st Sess. 5-6 (1977) (computers used pervasively in government); *Electronic Funds Transfer Systems: A Symposium,* 25 Cath. U.L. Rev. 687 (1976) (financial matters); *Medical Data Privacy: Automated Interference With Contractual Relations,* 25 Buff. L. Rev. 491 (1976) (medical profession); *Law and Technology*

Symposium, 52 Chi-Kent L. Rev. 545 (1976) (legal profession); *see generally Index and Tenth Selected Bibliography On Computers and the Law,* 5 Rutg. J. Computers & Law 505 (1976). While computers clearly benefit all by magnifying capabilities, they also magnify mistakes. "Computer error" is fearsome and has prompted considerable response, including comprehensive legislation, *see* Fair Credit Billing Act, 15 U.S.C. §§1661, et seq., and a voluminous report by a national commission. *See* National Commission on Electronic Fund Transfers, *EFT and the Public Interest* (1977). The legislative history to the Fair Credit Billing Act, describing the dangers of computer error, cites a Minneapolis study that found that one of three Minneapolis residents had been subjected to "computer error". S. Rep. No. 93-278, 93d Cong., 1st Sess. 5 (1973). A U.S. Senate study found federal government computer errors of "hundreds of millions of dollars a year", Senate Committee on Government Operations, *Problems Associated With Computer Technology in Federal Programs and Private Industry: Computer Abuses,* 94th Cong., 2d Sess. 50 (1976), and cited, for example, a 24% error rate in SSI computer checks in 1975, *Id.* at 425, an allegedly erroneous election result caused by "computer error", *Id.* at 433, and various natural occurrences and man-made problems affecting computer reliability. *Id.* at 427 ("Error is a Terror").

The incidence of computer error by utilities brought several federal courts to comment on the "Orwellian nightmare of computer control which breaks down through mechanical and programmers' failures and errors". *Bronson v. Consolidated Edison Co. of New York,* 350 F. Supp. 443, 444 (S.D.N.Y. 1972); *see also Palmer v. Columbia Gas, supra,* 479 F.2d at 158. The risk of error by computer is substantial, not because of its inherent unreliability, but because of the ease of replicating one error a thousandfold and the difficulty of resolving a problem with an impersonal machine.

The reported utility cases reveal a variety of both computer and human errors. Examples include improper late billing, *Trigg v. Tennessee Electric Membership Corp., supra*; billing one person

for the utility use of another, *Palmer v. Columbia Gas, supra*; billing the tenant for the landlord's bill, *Davis v. Weir,* 497 F.2d 139 (5th Cir. 1974); *Koger v. Guarino, supra*; refusing to investigate gas leaks until large bills result, *Palmer, supra*; failure to investigate excessive use of utilities resulting from the landlord's theft of utility services, *Bronson, supra*; *Palmer, supra*; and the instant case of double billings.

These reported cases do not represent isolated mistakes. For example, in *Bronson, supra,* the court noted that the New York Public Service Commission had found that 16% of all complaints investigated resulted in adjustments in favor of the customer. 350 F. Supp. at 448 n.11. The magnitude of such utility errors undoubtedly has provided impetus for many states and municipalities to adopt regulations such as those noted in Appendix A to this brief.

Furthermore, computer and human error are not the only reasons for imposing procedural requirements on MLG&W.[15] MLG&W has exhibited a callous, injurious attitude toward their customers, exemplified by the Crafts' experience. Although the District Court found that the Crafts had a valid dispute with MLG&W and made good faith efforts to resolve the problem, Mrs. Craft was cursed by an MLG&W employee, told to pay her bill twice, and was refused the names of any supervisors to contact to discuss the dispute. (A. 97, 103-4).

The high incidence of error and the callous attitude of some MLG&W employees demonstrate the need for notice and prior hearing to resolve disputes. Such procedural safeguards are necessary to provide customers with protection against unwarranted terminations based solely upon computer determinations.

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[15]In addition to the specific erroneous charges found by the District Court in the Crafts' case, there are at least two other issues not discussed. One related to the "net-gross" billing which is found in the form reprinted in the decision below as Exhibit 7, 534 F.2d at 688. Where a disputed bill is carried forward into a new billing period, the Crafts would always be paying the "gross" amount which includes a late payment penalty. Also, if the Crafts were billed erroneously as if they were two customers instead of one, they would fail to get any quantity discount which MLG&W provided.

3. The Administrative Burden of Additional Termination Procedures is Minimal, and Memphis Has An Interest In Avoiding Erroneous Terminations.

Numerous states and municipalities have adopted customer service regulations [16] providing substantial procedural safeguards prior to termination. As described in Appendix A to this brief, Public Utility Commissions in 15 states [17] have adopted regulations with substantial provisions for notice and hearings before utility termination. Such regulations typically require notice periods of several days; notice of procedural rights, including prior hearing rights; access to company records; an impartial oral hearing of some kind; and a written decision. Some regulations place the emphasis on hearings within the utilities while others place this responsibility in the regulatory commissions. In all cases there is the ultimate possibility of a full evidentiary hearing before an impartial regulatory body. This is in sharp contrast to MLG&W procedures which provide no hearing rights, either before or after termination.

The adoption and continued viability of these regulations demonstrate that minimum procedures are not at all burdensome. For example, although Michigan has one of the most comprehensive customer service regulations, a recent report by the Michigan Public Service Commission found that the

[16]The term "customer service regulations" describes both utility and regulatory practices relating to termination, security deposits, metering, billing, and late payment charges.

[17]Connecticut, Indiana, Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. Fairbanks, Alaska recently adopted extensive regulations. Fairbanks Ordinance No. 3576 (1977). In addition, various municipalities have adopted regulations by consent decree *See McMormick v. Dept. of Water,* Civ. No. C 73-797-4 (N.D. Ohio 1974); *Colgrove v. Cleveland Dept. of Public Utilities,* Civ. No. 74-1007 (N.D. Ohio 1974); *Mathiew v. Brehm,* Civ. No. 74-1521 (E.D. La. 1974); *Allen v. Dept. of Public Utilities,* Civ. No. 403-72-R (E.D. Va. 1973); *Wilkerson v. City of Jacksonville,* CCH Pov. L. Rep. ¶17,442 (M.D. Fla. 1973); *Babcock v. Schaffhauser,* Civ. No. 15,300 (D. Conn. 1972), as amended 1976).

regulations have been a nominal burden on utility companies and have had no impact on bad debt. The key findings of the report are:

> [I]mplementation of the Consumer Standards and Billing Practices has been beneficial to utility customers in the state of Michigan in that they have afforded both the customer and the utility a better understanding of each other and a tolerance for each other's problems.
>
> The following specific conclusions were drawn:
>
> 1. The combined total costs for implementation (as opposed to recurring expenses) of the Billing Practices Rules could not be accurately estimated. . . . If total expenses of implementation were $5 million, the cost would be approximately $1 per customer. . . . *The recurring costs associated with the Billing Practices Rules are believed to be negligible.*
>
> 2. *The Billing Practices had no appreciable negative influence on uncollectable expense and bad debt estimates* in spite of the fact that some companies routinely failed to collect accounts within the time frames permitted by the rules, that Michigan's economy was depressed during the period covered by this study and that deposits were virtually eliminated by the Billing Practices Rules.
>
> 3. The minimum standards in the Billing Practices are being implemented by all companies. Several companies allow customers more time to pay their bills than is required by the Billing Practices Rules.
>
> 4. The medical emergency provision has been invoked on very few occasions. Company apprehensions of misuse of this provision have proven groundless.
>
> 5. The most difficult area for transition was the hearings and appeals provision. Subsequent to implementation of the Billing Practices, *the utilities experienced costs and personnel requirements that have been far less than projected levels.*
>
> 6. *Continuing costs associated with administration of the rules are less than anticipated.* (emphasis added)

Report of the Public Services Commission on the Utility Company Survey of Consumer Standards and Billing Practices of Electrical and Gas Residential Service (Nov. 29, 1976) at 1-2.

One obvious reason for the negligible costs of such regulations is that the hearing usually will not involve witnesses or evidence other than the utility's records and the customer's own story. Billing disputes typically do not require expert testimony, difficult judgments on fault, misconduct or motive, or any balancing of interests.

Nor does the government have a strong interest in immediate termination. In fact, the government's interest coincides with the Crafts' and other MLG&W customers' in avoiding erroneous deprivation.

MLG&W cites its fiscal obligation to all Memphis citizens to justify the lack of procedural protections. However, the possibly delayed payment[18] is not non-payment, particularly since the customer must pay all past and current undisputed charges or face the effective coercion of immediate termination. (A. 76). *See Trigg v. Middle Tenn. Electric Membership Corp., supra*; *Crumley v. Watauga Water Co., supra.* As the Michigan Public Service Commission report, *supra,* documents, even extensive regulations have "no appreciable negative influence on uncollectable expense and bad debt statements". Significantly, MLG&W can recover any losses occasioned by delayed payment through the imposition of late charges (A. 114, 117), application of the deposit (A. 117), or by filing suit.

Fiscal integrity obviously is important for a utility; yet MLG&W cannot cite any evidence that procedural protections may impair its ability to collect proper bills or have any significant effect on its financial resources. Indeed, the only evidence is to the contrary. *See Report of the [Michigan] Public Services Commission, etc., supra.* This minimal government interest is contrasted with the strong state interest of removing dangerous drivers from the highways, *Dixon v. Love, supra,* or protecting the

[18]It is questionable whether any additional delay need result from adoption of procedural protections. Petitioners' regulations currently provide a delay of at least thirty days from billing to termination for non-payment. *See* Petitioners' Brief at 28. Notice and hearing within this period will occasion no further delay.

interests of foster children, *Smith v. Organization of Foster Families, supra.*

Indeed, termination regulations way well enhance MLG&W's financial situation. The Pennsylvania Public Utilities Commission, in proposing extensive new regulations, stated:

> It is anticipated that by implementing these regulations the Commission will be able to deal more expeditiously with consumer complaints, and in the long run, reduce administrative and carrying costs for affected utilities.

Proposed Standards and Billing Practices for Residential Utility Service, 6 Pa. Bull. 2989, Docket No. 76-PRMD-10 (Dec. 4, 1976). In addition, the City of Memphis has a clear interest in avoiding erroneous terminations which may precipitate public health problems from lack of water or illness and death from lack of heat. *See* City of Memphis Code §51-111, et seq.

Based on the severe deprivation, high risk of error, and absence of strong governmental interest, the Crafts are entitled to adequate notice and a meaningful hearing before an impartial decision-maker prior to termination of service. They do not seek the full panoply of rights provided by public utility commissions in numerous states, *see* App. A to this brief, but only those rights necessary to prevent egregious and harmful error. All federal district courts and courts of appeal finding a protected property interest in utility service are in agreement on the minimum due process requirements of adequate notice and hearing prior to termination. *See Craft v. MLG&W, supra*; *Palmer v. Columbia Gas Co., supra*; *Koger v. Guarino, supra*; *Davis v. Weir, supra*; *Dawes v. Philadelphia Gas Works,* 421 F. Supp. 806 (E.D. Pa. 1976); *Donnelly v. City of Eureka,* 399 F. Supp. 64 (D. Kan. 1975); *Condosta v. Vermont Elec. Cooperative,* 400 F. Supp. 358 (D. Vt. 1975); *Cottrell v. Virginia Elec. & Power Co.,* 62 F.R.D. 516 (E.D. Va. 1974); *Limuel v. Southern Union Gas Co.,* 378 F. Supp. 964 (W.D. Tex. 1974); *Hattell v. Public Service Co.,* 350 F. Supp. 240 (D. Colo. 1972); *Bronson v. Consolidated Edison Co. of New York, supra*; *Lamb v. Hamblin, supra*; *Stanford v. Gas Service Co., supra*; *but cf. Jackson v. Metropolitan Edison Co.,* 483 F.2d 754 (3rd Cir. 1973), *aff'd,*

419 U.S. 345 (1974) (dicta, no state action); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. den.*, 409 U.S. 1114 (1973) (same).

MLG&W would have the Court disregard the traditional prior notice and hearing rule. Without any balancing of the interests articulated in *Mathews v. Eldridge, supra,* MLG&W suggests that the "common law remedies" of injunction prior to termination, suit for damages for wrongful termination, and payment under protest are sufficient to satisfy due process.

The common law remedies can be constitutionally adequate in certain specific contexts, such as where strong historical and institutional considerations weigh heavily compared to a minor private interest and a small risk of error. For example, in *Ingraham v. Wright, supra,* an action challenging public school corporal punishment, this Court noted that corporal punishment of public school children was "rooted in history", *Id.* at 1418, and critical to maintaining the discipline and order necessary for proper functioning of the institution. *Id.* at 1418; *see also Taylor v. Hayes,* 418 U.S. 488 (1974) (trial court may punish contemptuous conduct without notice and hearing where necessary to maintain order). For these reasons, and because the risk of erroneous deprivation was slight, *Ingraham v. Wright, supra,* 97 S. Ct. at 1418, the Court was reluctant to become immersed in the daily operation of the public schools or interfere with the necessarily broad discretionary authority vested in local school officials. *Id.* at 1418; *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969); *cf. Goss v. Lopez, supra,* 419 U.S. at 589-91 (Powell, J., dissenting). [19]

In contrast, utilities are natural monopolies with public duties and are subjected to extensive control and regulation intended to protect the public from the arbitrary exercise of monopoly

[19]The Court's reluctance to substitute its judgment for that of local school officials is similar to its reluctance to interfere in the daily operation of a prison. *See Meachum v. Fano,* 427 U.S. 215 (1976).

power. [20] *See, e.g., F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1943). Because the relationship between a utility and its customers is not one of continuing personal supervision, courts have not hesitated to decide issues affecting internal utility management. *See, e.g., F.P.C. v. United Gas Pipeline Co.*, 386 U.S. 237 (1967) (accounting methods for rate determination); *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (utility's monopoly status permits imposition of Executive Order No. 11246 requiring equal opportunity obligation and permitting inspection of books, even absent consent). In particular, this Court increasingly has become active in curbing the abuse of the monopoly position by public utilities. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1972).

The "common law remedies" also may be adequate constitutionally where the deprivation is not as severe as termination of water, gas and electricity, the remedies supplement existing administrative procedures, and the party is not entirely government owned. *Cf. Lucas v. Wisconsin Electric Power Co., supra,* a pre-*Eldridge* case not involving a balancing of interests, where a privately owned electric utility was regulated by the state public utility commission with its own complaint resolution procedures.

Here, however, MLG&W is a municipally-owned utility providing life-sustaining utility service to Memphis residents, has no hearing procedure either prior to or after termination, is not subject to regulation by, or hearing procedures of, a public utility

[20]In general, the Court has indicated more process is due where, as in this case, the state has a monopoly in the services it renders. *Compare Boddie v. Connecticut,* 408 U.S. 371 (1971) (filing fee requirement for divorce violated due process for indigents where state monopolizes means for legally dissolving marriages) *with United States v. Kras,* 409 U.S. 434, 443-446 (1973) (filing fee requirement for bankruptcy petition not violative of due process since debtor has alternatives) and *Ortwein v. Schwab,* 410 U.S. 656, 659-660 (1973) (no due process violation for filing fee in appeal from adverse welfare decision since welfare recipient had hearing not conditioned on payment of fee).

commission to review its excesses, has no procedure for minimizing computer billing errors, and has only a minimal interest in prompt payment.

Furthermore, the purported "common law remedies" cited by MLG&W are not adequate in Tennessee. The Tennessee courts consistently have held that a utility customer may not be required to pay a disputed bill as a condition of continued service. *Crumley v. Watauga Water Co., supra*; *Trigg v. Middle Tenn. Electric Membership Corp., supra.* Thus, payment under protest is considered an inadequate remedy under Tennessee law. Nor can suit for damages for wrongful termination be considered adequate for residential termination, because the danger to health cannot be evaluated monetarily. *See Stanley v. Illinois,* 405 U.S. 645, 647 (1972) (custody proceedings violated equal protection for unwed father even though custody could have been regained later by adoption); *compare with North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Fuentes v. Shevin,* 407 U.S. 67 (1972), and *Sniadach v. Family Finance Co., supra* (although deprivation of money and personal property is susceptible to monetary evaluation and suit for conversion was available, procedures violated due process). Similarly, this Court consistently has held procedures violative of due process despite the apparent availability of injunctive relief. *See, e.g., North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Perry v. Sindermann, supra*; *Bell v. Burson, supra*; *Goldberg v. Kelly, supra.*

Thus, the Crafts submit that the following procedures are the minimum required by due process. The notice should fully and clearly apprise the customer of the utility's proposed action and the reason therefor, the procedures available to the customer to dispute the bill, and the time in which the customer must act to avoid termination. *See Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. at 306. Also, to be meaningful the notice must permit adequate time for the customer to investigate and respond. *Id.*

A customer disputing the bill should be allowed a reasonable time to contact MLG&W about the matter. During this time, his utilities should not be terminated, and if contact is made within this

period, and the dispute not resolved, utility services should be continued pending resolution of the dispute. If the customer does not contact MLG&W during this reasonable period, his utilities may be terminated without further notice.

After notice, if the dispute is not resolved in an initial meeting with an MLG&W supervisor, such as the Superintendent of Credit and Collections, the Supervisor of Credit and Collections, or the Chief Clerk of the Credit Department, a hearing of some kind is necessary. The hearing, to be "meaningful", *Armstrong v. Manzo, supra,* should have three basic requirements in the utility context: 1) an impartial decision maker; 2) the opportunity to present information and rebut the records presented; and 3) a written decision.

While the impartial decision maker may be an employee of the City of Memphis or an independent third party, the decision maker must be truly independent and have sufficient authority to resolve the dispute in the customer's favor. The decision maker's independence and authority are particularly important since there is no statute or regulation under Tennessee law authorizing an appeal.

The actual "hearing" could be informal. However, it must provide the customer the opportunity to present information in support of his position. As stated by the Court in *Londoner v. Denver,* 210 U.S. 373, 386 (1908), a case involving the due process requirements for municipal tax assessments, "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

The opportunity to rebut MLG&W's records is particularly necessary since a computer makes the determination. These records must be presented to the decision maker and also made available to the customer in an intelligible form. Otherwise, the customer will have no meaningful way of disputing the computer's conclusion or knowing its calculations.

Finally, a written decision is important to avoid subsequent disputes based on the same errors. The "decision" may be merely a brief written notice of decision, but it should specifically address the substance of the dispute.

CONCLUSION

Respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Sixth Circuit and hold that Respondents' interest in water, gas and electricity service from Petitioners is protected by the Due Process Clause of the Fourteenth Amendment.

Respondents further request that this Court find Petitioners' procedures for resolving disputes insufficient to satisfy due process. Respondents suggest that the minimum elements of due process include adequate notice and a meaningful hearing before an impartial decision-maker prior to termination, the opportunity to present information and rebut the records presented, and a written decision.

Respectfully submited,

THOMAS M. DANIEL
Memphis & Shelby County
Legal Services Association
325 Dermon Building
46 North Third Street
Memphis, Tennessee 38103
Counsel for Respondents

On The Brief:

RICHARD H. ALPERT
ALAN DAVIS
ELLIOT TAUBMAN
National Consumer Law Center,
Inc.
11 Beacon Street
Boston, Massachusetts 02108

BRUCE MAYOR
Neighborhood Legal Services
524 Albany Avenue
Hartford, Connecticut 06112

APPENDIX A

ANALYSIS OF TERMINATION REGULATIONS BY STATE

I. UTILITIES MAY NOT TERMINATE WHILE COMPLAINT IS PENDING BEFORE THE UTILITY OR THE STATE REGULATORY AGENCY

State	*Regulation*
Connecticut	P.U.C. §16-3-100(B)(3)(b)
Illinois	I.C.C. §16
Indiana	P.S.C. Rule 16.1(C)(1)
Maine	P.U.C. §6(A)
Massachusetts	D.P.U. §2-1
Michigan	P.S.C.R. 460.2164(y)
Minnesota	P.S.C. §303(d); §298(b)(4)
Missouri	P.S.C. Rule 40(d)
New Hampshire	Rev. Stat. Ann. 363-B:2 II
New Jersey	N.J.A.C. 14:407-2f
New York	Electric-P.S.C. §143.8(a)
	Gas-P.S.C. §275.8(a)
	Water-P.S.C. §531.8(a)
Rhode Island	P.U.C. §6
Washington	W.A.C. 480-100-071(2)(g)(4)
Wisconsin	P.S.C. 113-132(1)(c)

II. NOTICE OF TERMINATION MUST INCLUDE:

A. Statement of Right of Informal Review with Utility

Illinois	I.C.C. Appendix II
Indiana*	P.S.C. Rule 16.2
Michigan	P.S.C.R. 460.2164(f)
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New Jersey	N.J.A.C. 14:3-7.12(2)

*Incorporated in Statement of Customer Rights

State	*Regulation*
New York	Electric-P.S.C. §143.3(iv) Gas-P.S.C. §275.2(iv) Water-P.S.C. §531.2(iv)
Rhode Island	P.U.C. §4(c)(4)
Washington	W.A.C. 480-100-071(2)(b)

B. Right to Request Hearing with State Regulatory Agency

Indiana*	P.S.C. Rule 16.2
Massachusetts	D.P.U. §2.3
Maine	P.U.C. §3(E)
Michigan	P.S.C.R. 460.2164(f)
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New Jersey	N.J.A.C. 14:3-7.12(1)
Rhode Island	P.U.C. §4

C. Statement of Action Needed to Avoid Termination

Illinois	I.C.C. §15
Indiana	P.S.C. Rule 16(E)(2)
Maine	P.U.C. §3(B)
Massachusetts	D.P.U. §2.3
Michigan	P.S.C.R. 460.2164
Minnesota	P.S.C. 300(e)
Missouri	P.S.C. Rule 35
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New York	Electricity-P.S.C. §143.2 Gas-P.S.C. §275.2 Water-P.S.C. §531.2
Rhode Island	P.U.C. §4(c)(2)
Washington	W.A.C. 480-100-071(2)(b)
Wisconsin	P.S.C. 113-132(9)(c)

*Incorporated in Statement of Customer Rights

State	*Regulation*

D. Statement That Service May Not Be Terminated Pending Resolution of Dispute

Indiana*	P.S.C. Rule 16.2
Connecticut*	P.U.C. 16-3-100(c)(1)
Maine	P.U.C. §3(E)(vi)
Massachusetts*	D.P.U. §2.3
Michigan	P.S.C.R. 460.2164(h)
Minnesota*	P.U.C. 16-3-100(c)(1)
New Hampshire*	Rev. Stat. Ann. 363-B:1 I

III. UTILITY MUST INVESTIGATE AND ATTEMPT TO RESOLVE DISPUTE

Connecticut	P.U.C. 16-3-100(c)(4)
Illinois	I.C.C. §15
Indiana	P.S.C. Rule 16.1(A)(2)
Maine	P.U.C. §6(A)
Massachusetts	D.P.U. §2.4(1)
Michigan	P.S.C.R. 460.2142
Minnesota	P.S.C. 303(a)
Missouri	P.S.C. Rule 25(a), 26, 40
New Hampshire	Rev. Stat. Ann. 363-B:2:I
New Jersey	N.J.A.C. 14:407-2f
New York	Electric-P.S.C. §143.8(a) Gas-P.S.C. §275.8(a) Water-P.S.C. §531.8(a)
Rhode Island	P.U.C. §5(a)
Washington	W.A.C. 480-100-096(1)
Wisconsin	P.S.C. 113.132(1)(c)

IV. PENDING RESOLUTION OF DISPUTE UTILITY MUST INFORM CUSTOMER OF RIGHT TO APPEAL TO STATE REGULATORY AGENCY

Connecticut	P.U.C. 16-3-100(c)(4)
Illinois	I.C.C. §20

*Incorporated in Statement of Customer Rights

State	*Regulation*
Indiana	P.S.C. Rule 16.1(A)(3)
Maine	P.U.C. §6(B)
Massachusetts	D.P.U. §2.4(1)
Michigan	P.S.C.R. 460.2169(8)(a)
New Hampshire	Rev. Stat. Ann. 363-B:2 III
New York	Electric-P.S.C. §143.8(b)
	Gas-P.S.C. §275.8(b)
	Water-P.S.C. §531.8(b)
Rhode Island	P.U.C. §6
Washington	W.A.C. 480-100-096(3)
Wisconsin	P.S.C. 113.132(1)(d)

V. RESULT OF HEARING WITH UTILITY MUST BE IN WRITING

Connecticut	P.U.C. 16-3-100(c)(4)
Indiana	P.S.C. Rule 16.1(A)(2)
Massachusetts	D.P.U. §2.4
Michigan	P.S.C.R. 460.2169(9)
Missouri	P.S.C. Rule 42(b)
New York	Electric-P.S.C. §143.8(b)
	Gas-P.S.C. §275.8(b)
	Water-P.S.C. §531.8(b)

APPENDIX B

Tenn. Code Ann.

6-1306. Exemption from utilities regulation.—It shall not be necessary for any municipality, proceedings under this chapter, to obtain any certificate of convenience or necessity, franchise, license, permit, or other authorization from any bureau, board, commission or other like instrumentality of the state in order to acquire, construct, purchase, reconstruct, improve, better, extend, maintain and operate any public works.

6-1317. Exemption from utilities commission.—No requirements or provisions of this chapter shall be construed so as to deprive any municipality issuing bonds pursuant hereto of the exemption heretofore granted to municipalities from the jurisdiction of the public service commission.

Code of Ordinances, City of Memphis:

Article V. Basic Facilities

DIVISION 1. REQUIRED FACILITIES

Sec. 51-111. Compliance with division.

No person shall occupy as owner-occupant, or let to another for occupancy, any dwelling unit for the purpose of living, sleeping, cooking or eating therein which does not comply with the requirements of this division. (Ord. No. 1724, §400.0, 3-22-66)

Sec. 51-112. Sanitary facilities.

(a) *Generally.* The minimum sanitary facilites specified in this section shall be supplied and maintained in sanitary and safe working condition.

(b) *Water closet.* Every dwelling unit shall contain within its walls a room, separate from the habitable rooms, which affords privacy and which is equipped with a water closet. Entry to such room shall be from within the unit only.

(c) *Lavatory.* Every dwelling unit shall contain a lavatory, which shall be in close proximity to the water closet.

(d) *Bathtub or shower.* Every dwelling unit shall contain a room which affords privacy to a person in the room and which is equipped with a bathtub or shower.

(e) *Kitchen sink.* Every dwelling unit shall contain a kitchen sink apart from the lavatory required by subsection (c).
(Ord. No. 1724, §§401.0—401.4, 3-22-66; Ord. No. 25, §16, 10-10-67)

Amendment note—Ord. No. 25, §16, amended §51-112(b) by adding the last sentence thereto.

Sec. 51-113. Water and sewer system.

Every kitchen sink, lavatory basin, bathtub or shower and water closet required under the provisions of section 51-112 shall be properly connected to either a public water and sewer system or to an approved private water and sewer system. All sinks, lavatories, bathtubs and showers shall be supplied with hot and cold running water. (Ord. No. 1724, §402.0, 3-22-66)

Sec. 51-114. Water heating facilities.

(a) Every dwelling unit shall be supplied with water heating facilities which are installed in an approved manner, properly maintained, and properly connected with hot water lines to the

fixtures required to be supplied with hot water under section 51-113. Water heating facilities shall be capable of heating water to such a temperature as to permit an adequate amount of water to be drawn at every required kitchen sink, lavatory basin, bathtub, shower, and laundry facility or other similar units, at a temperature of not less than one hundred thirty (130) degrees Fahrenheit at any time needed.

(b) Every water heating facility shall be installed and shall operate in accordance with the requirements of the building code and the air pollution control ordinances* of the city. (Ord. No. 1724, §§402.1, 403.1, 3-22-66)

Sec. 51-115. Heating facilities.

(a) Every dwelling and multi-family dwelling shall have provisions for heating facilities. The owner of the heating facilities shall be required to see that they are properly installed, safely maintained and in good working condition, and that they are capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms located therein.

(b) Every heating facility shall be installed and shall operate in accordance with the requirements of the building code and the air pollution control ordinances* of the city. (Ord. No. 1724, §§403.0, 403.1, 3-22-26; Ord. No. 25, §17, 10-10-67)

Amendment note—Ord. No. 25, §17, amended §51-115(a) which prior to amendment designated the temperature to which the heating facilities should be capable of heating the rooms therein listed.

***Cross reference**—Air pollution, Ch. 3.

Sec. 32-103. Well digger's permit.

No person shall engage in drilling, boring, digging or otherwise constructing or repairing wells in the city without a permit from the department of health. Such permit shall be granted by the health department to any person upon application properly approved by the health officer, and such permit shall be in force and effect for one (1) year from the date of its issuance. The health officer shall have the power and it shall be his duty to revoke any permit issued where it is made to appear that the provisions of this article have been violated by the person engaged in well construction. The holder of such permit shall, after such revocation, have the right of appeal to the board of commissioners. (Code 1949, §1242)

Sec. 32-104. Permit to operate and maintain private supply.

(a) No person shall operate or maintain a private water supply until a permit therefor has been issued by the department of health, which permits shall not be valid for longer than one year and may be renewed at the expiration thereof upon payment of the fees hereinafter set out. All permits shall be in writing. Such permit may be revoked by the health officer upon the violation by the holder of any of the terms of this article, or in any emergency when, in the judgment of the health officer, the continued operation of the private water supply will be a public health menace. The holder of such permit, after such revocation, shall have the right of appeal to the board of commissioners.

(b) The yearly permit to operate or maintain a private water supply shall not be issued until an inspection fee is paid each year to the department of health. A fee of one hundred dollars ($100.00) shall be paid by the owner of one private water supply well, whether shallow, deep, abandoned or condemned. An additional charge of twenty-five dollars ($25.00) shall be paid for each additional well whether operating or not. The fee shall be due and payable on or before January 31 of each year. (Code 1949, §§1239, 1240; Ord. No. 352, §1, 12-31-68)

Sec. 32-105. Approval of plans and specifications for private supply.

Before work is commenced on the construction of any new well or private water supply, or any additions, alterations or changes, including cross connections, treatment, settling and storage tanks, aerators, wells, suction lines and any other part of such private water supply listed in any regulations adopted by the department of health, complete plans and specifications, accompanied by such pertinent data as may be required, shall be submitted, by the owner or his agent, to the department of health, and no part of the work shall be commenced until the department has given its written approval. (Code 1949, §1241)

Sec. 32-106. Approval of plans and specifications for sewer work on property served by private supply.

Before any work is commenced on the construction of any sewers, sewage treatment plants, or any part of the sewerage system constructed underground, or any additions, alterations or major changes to an existing sewerage system on private property on which there is a private water supply, complete plans and specifications, accompanied by such pertinent data as may be required, shall be submitted by the owner or his agent to the department of health, and no part of the work shall be commenced until the department of health has given its written approval; provided, that this does not include changes and repairs to plumbing in buildings and above the ground which is controlled by the plumbing inspector of the city. (Code 1949, §1243)

Sec. 32-107. Location, construction and operation of private supplies.

All private water supplies shall be properly located, constructed and operated, and be of an approved quality. (Code 1949, §1245)

Sec. 32-108. Inspection of private supplies.

All private water supplies shall be open for inspection at all times by the health officer or the light, gas and water division. (Code 1949, §1245)

Sec. 32-109. Location, construction and operation of wells generally.

All wells shall be located, constructed and operated in accordance with the *rules and regulations adopted by the department of health, and the water shall be of a safe, sanitary quality.*

No well shall be located close enough to any existing or proposed well of the light, gas and water division of the city to materially affect the static head of water from the underground strata of any such well or proposed well of the public supply. (Code 1949, §1244)

Sec. 32-110. Location of wells in street, alley or public place.

No well shall be located in a street, alley or public place without a permit from the board of commissioners.

Any person making application for a permit to construct a well in any street, alley, or other public place shall be required, as a condition precedent to the issuance of such permit, to agree that if at any time subsequent to the construction of such well it shall become necessary for the city to use such street, alley, or other public place, for any public purpose, such person shall, within ninety (90) days after the receipt of notice from the city, abandon, dismantle, and fill such well, at his own expense. (Code 1949, §1244)

Sec. 32-111. Filling of abandoned or condemned wells.

The health department may order the owner to fill up any abandoned or condemned well. (Code 1949, §1244)

Cross reference—Open and uncovered wells prohibited, §22-20.